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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY, AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*,

v.

FEDERAL POWER COMMISSION, EDWIN L. COX, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, LAMAR HUNT, SOHIO PETROLEUM COMPANY, SUN OIL COMPANY, SUNRAY DX OIL COMPANY, TEXACO INC., AND UNION PRODUCING COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Electric Company, and the Public Service Commission of the State of New York pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 9, 1966.

OPINIONS BELOW

The opinion of the court of appeals (FPC Pet. 15-48[1]) is reported at 370 F. 2d 181. The opinion and order of the Federal Power Commission is reported at 31 FPC 623.

JURISDICTION

The judgment of the court of appeals affirming in part and reversing in part the Commission's order was entered on December 9, 1966 (Appendix A, *infra*, p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. In passing upon producer certificate applications under Section 7 of the Natural Gas Act, may the Federal Power Commission, consistent with this Court's *Catco* decision,[2] elevate its previously determined in-line certificating level by reference to: (a) the prices contained in the contracts for which certificate authority is being sought, (b) the prices contained in temporary certificates issued on an *ex parte* basis pending the outcome of the statutorily required hearing on the underlying certificate application, and (c) the "guideline" prices contained in the Commission's Statement of General Policy?

2. Where the Commission, having issued *ex parte* temporary certificates to producers pending hearing

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[1] "FPC Pet." refers to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Federal Power Commission in No. ——.

[2] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

and disposition of their certificate applications, determines after full hearing on those applications that the prices collected pursuant to the temporary certificates were out of line and not consistent with the public convenience and necessity, does the Commission have the power and the duty to require the producer applicants to refund the excess amounts collected under the temporary certificates?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, are set out in Appendix B, *infra,* pp. 2a-6a.

STATEMENT

Background—The Gulf Coast area of Texas, which in recent years has accounted for 17-20% of all gas sold for resale in interstate commerce, has been divided into three districts by the Texas Railroad Commission, and the state commission's classification has been followed by the producing industry and by the Federal Power Commission. The most southerly district—and the one directly involved in this proceeding—is Texas Railroad Commission District No. 4, a fifteen-county area bounded on the south and west by Mexico and on the east by the Gulf of Mexico. Immediately to the north along the Gulf is District 2, a ten-county area, and to the north of District 2 and stretching to the Louisiana border are the twenty-nine counties comprising District No. 3. Most of the major pipelines serving the Northeast begin in the Texas Gulf Coast and traverse these three Districts before heading into Louisiana and on north.

Although at the advent of producer regulation, in 1954, gas in the Texas Gulf Coast sold at an average price of less than 10¢ per Mcf, during the late '50's the Commission authorized a number of new sales at higher prices, culminating in a series of orders in 1959-60 certificating new sales at prices as high as 18¢ per Mcf. These levels were arrived at, however, in Commission proceedings from which interested consumer intervenors had been excluded, and on appeal the courts held that such exclusion was improper and remanded the cases to the Commission for further proceedings. *Public Service Commission of New York* v. *F.P.C.*, 295 F. 2d 140 (D.C. Cir. 1961), *cert. denied,* 368 U.S. 948. Then, in September 1960—after its issuance of the 18¢ certificates and while the ultimately successful appeal from those certificates was pending—the Commission, acting *in camera,* issued a Statement of General Policy, 24 FPC 818, in which it announced for each producing area the "guideline" initial-price levels at which, in the absence of objection, it intended to certificate new sales. These guideline levels were, as Mr. Justice Clark was subsequently to observe, based on "the *highest* permanently certificated rate in the respective areas as of September 1960", they were "nonreviewable", and they had "no binding effect", *Wisconsin* v. *F.P.C.*, 373 U.S. 294 at 316, 327 (dissenting opinion). The initial-price guidelines for Districts 2, 3, and 4 were fixed at 18¢ per Mcf, but, as the Commission itself later conceded, the sales on which the Gulf Coast guideline levels were based had been erroneously certificated after exclusion of interested consumer interveners, and they could not be used for in-line purposes.

The first contested Commission proceeding involving the Gulf Coast area to be decided following issuance of

the Policy Statement—and the first to be decided in accordance with this Court's *Catco* standards—was the *Skelly* case, *Skelly Oil Co.,* Op. 362, 28 FPC 401 (1962).[3] There, the Commission held that the proper certificating (or "in-line") level in District 4, at least for contracts entered into prior to the September 1960 Policy Statement, was 15¢ per Mcf. However, with two Commissioners dissenting, the Commission concluded that it should not decide on the basis of the *Skelly* record that the in-line level had continued at 15¢ *after* issuance of the Policy Statement, and accordingly it severed from *Skelly* and set for separate hearing four dockets based on contracts entered into after September 1960. Contemporaneously with its *Skelly* opinion, the Commission revised its Policy Statement guideline for District 4 from the 18¢ established in September 1960 to 16¢, or 1¢ more than the in-line level it had just found in *Skelly,* 28 FPC 441. The dissenting Commissioners, unable to perceive how issuance of the *in camera* 18¢ guideline (now demonstrated by the record in *Skelly* to be excessive by 3¢) could have any effect on the in-line level, would have issued certificates conditioned at 15¢ to the four *Skelly* applicants having post-September 1960 contracts, and would have reduced the guideline level for the future to the 15¢ in-line price.

The Present Proceedings—The four dockets severed from the *Skelly* case were consolidated with 34 other producer applications to sell gas from District 4 fields under the lead docket, *Amerada Petroleum Corporation,* CI62-1544, 28 FPC 397 (J.A. 197). The *Amerada*

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[3] Affirmed as to in-line level, *Public Service Commission of New York* v. *F.P.C.,* 117 App. D.C. 287, 329 F. 2d 242 (1964), *cert. denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.,* 377 U.S. 963.

producer contracts, which called for initial prices ranging from 15.9¢ to 19.8¢ per Mcf,[4] had been entered into between October 1960 and August 1962, and the purpose of the *Amerada* proceeding presumably was to determine the effect, if any, that the Policy Statement had upon the 15¢ in-line level which had obtained in District 4 up to issuance of the Statement.

The most significant evidence presented at the hearing, held in the latter part of 1962, was an exhibit sponsored by an FPC staff economist (Exh. 16, J.A. 163-188) showing price and other information for all post-1954 District 4 contracts which called for a price of 14¢ or more and had been filed as rate schedules with the FPC. The exhibit classified the contracts into three groups: Schedule 1 showed the proposed sales for which certificate authority was being sought in the *Amerada* proceeding itself; Schedule 2 showed all sales which had been permanently certificated; and Schedule 3 showed sales being made under temporary certificates pending Commission action on final certification.

By decision issued July 28, 1963 (31 FPC 647; J.A. 285-341), the examiner held that both as a matter of fact and as a matter of law the promulgation of the Policy Statement guidelines had no effect on the appropriate in-line level for contracts negotiated after promulgation of the guidelines, and that determination of the in-line price for such contracts should be based on the same standards—an analysis of permanently certificated contracts dated during the time period in question—applied by the Commission in *Skelly* and subsequent cases. Such an analysis produced an in-line

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[4] Actually, there was only one proposed price at 19.8¢; the next highest was 18¢.

level of 15¢ per Mcf, at which price the examiner recommended that certificates should issue to the *Amerada* producers. On the question of refunds of amounts in excess of 15¢ collected under the temporary certificates, the examiner ruled that he was bound by the Commission's *Skelly* precedent (subsequently reversed on the refund point by the D.C. Circuit[5]) and therefore declined to order refunds.

The Commission's Determination—On March 23, 1964, the Commission issued its order in this case (Opinion No. 422, 31 FPC 623; J.A. 354-96) reversing the examiner on the key finding that the in-line price was 15¢ per Mcf. While apparently conceding that the in-line procedure followed by the examiner and theretofore consistently followed by the Commission—an analysis of permanently certificated contracts that were not suspect—would lead to an in-line finding of 15¢ per Mcf (J.A. 368-70; 394), the Commission held that the prior permanent certifications provided an inadequate sample, and that, accordingly, weight should be given to the contract prices negotiated during the period in question (whether or not certificated by the Commission), to the prices contained in temporary certificates, to the prices being requested by the *Amerada* applicants, to the 18¢ Policy Statement guideline, and to Commission "expertise"; consideration of these factors led the Commission to find an in-line price of 16¢ per Mcf. Commissioner Ross, dissenting, pointed out that none of the bases used by the majority to arrive at the 16¢ figure was legally permissible, and that "the rule [adopted by the majority] in this case is that when the normal evidentiary basis for establishing

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[5] *Public Service Commission of New York* v. *F.P.C.*, 329 F. 2d 242 (1964), *cert. denied*, 377 U.S. 963.

an in-line price is absent, then anything else will do" (31 FPC at 643; J.A. 389).

On the refund question, the Commission, while noting that two months earlier the D.C. Circuit had in the *Skelly* appeal reversed the Commission's refusal to order refunds of excess amounts collected pursuant to temporary certificates, nonetheless deferred to an indefinite future date resolution of the refund matter.

Decision of the Court of Appeals—Within minutes of the Commission's denial of rehearing, Sunray DX Oil Company—the only party to the consolidated proceedings located in the Tenth Circuit—filed its petition for review in the Tenth Circuit. Although Sunray's well had run dry even prior to the commencement of the hearings (see FPC Pet. 58), the Tenth Circuit held that it had proper venue, and accordingly the petitions for review filed by the consumer petitioners in the D.C. Circuit and by the other producers in the Third, Fifth, and Sixth Circuits were transferred to the Tenth Circuit.

The court sustained the Commission's finding that 16¢ was the proper in-line price. Though apparently conceding that the factors relied on by the Commission to arrive at the 16¢ price were, in fact, "suspect" under the prior court and Commission decisions, the court held that, in the circumstances of this case, reference to "suspect" prices was necessary in order to reflect properly "the price at which substantial volumes of gas are currently contracted for sale in interstate commerce." (370 F. 2d at 189; FPC Pet. 28) On the refund question, the court below, noting its disagreement with the holding of the D.C. Circuit in the *Skelly* appeal,

ruled that the Commission was without power to require refunds of excess amounts collected under temporary certificates. Accordingly, it ruled that the Commission erred in severing the refund question, since the only course open to the Commission was to discharge the producers from any refund liability whatsoever. Judge Seth dissented in part. While noting his agreement with the majority's test that the in-line level must be determined by current market conditions, he felt that proper reference to such conditions would yield a figure higher than 16¢.

Related Developments Subsequent to Amerada—In the spring of 1964, shortly after issuance of the *Amerada* opinion here under review, the Commission decided to consolidate for each Texas Gulf Coast district all of the remaining certificate applications in which initial price was an issue: 42 pending District 2 applications were consolidated as a new proceeding, *Sinclair Oil & Gas Co. et al.*; 40 District 3 applications were consolidated as *Hawkins & Hawkins et al.*; and 67 District 4 applications were consolidated as *Turnbull & Zoch Drilling Co. et al.* Following hearings and examiner's decisions in each of the three proceedings, the Commission rendered its opinions in September 1965; in each case the Commission's result was consistent with its result in *Amerada*. Thus, in *Hawkins & Hawkins*, Op. 475, 34 FPC 897, the Commission, two Commissioners dissenting,[6] held that the District 3 pre-Policy State-

[6] Commissioner Black stated in Op. 475: "Although I participated with the majority in [*Amerada*], were that case before us now I would express different views. I do not believe that it is consonant with our responsibilities under the Natural Gas Act as interpreted by the courts for us to rely on temporary prices in cases at issue before us in determining an in-line price."

ment in-line level of 16¢ had escalated to 17¢ upon issuance of the Policy Statement; in *Sinclair Oil & Refining Co.,* Op. 476, 34 FPC 930, the Commission, with two Commissioners dissenting, held that the District 2 pre-Policy Statement in-line level of 15¢ had escalated to 16¢ upon issuance of the Policy Statement; and in *Turnbull & Zoch Drilling Co.,* Op. 478, 34 FPC 1001, the Commission, with one Commissioner dissenting,[7] held, as it had in *Amerada,* that the District 4 pre-Policy Statement in-line level of 15¢ had escalated to 16¢ upon issuance of the Policy Statement. In each of the three September 1965 Opinions, the Commission justified the 1¢ rise in in-line level, as it had in *Amerada,* by reference to the prices contained in the contracts before the Commission for decision, on the prices contained in temporary certificates, and the guideline levels contained in the Policy Statement. And in each of the three cases, as in *Amerada,* the Commission deferred for later action the question of whether to order refunds of excess amounts collected under temporary certificates during the pendency of the applications.

Appeals from these three Opinions were taken by both the consumer and the producer interests. The first appeals of *Hawkins* and *Sinclair* were filed in the District of Columbia Circuit, and the first appeal of *Turnbull & Zoch* was filed in the Fifth Circuit. On February 7, 1967, the District of Columbia Circuit, in a decision written by Chief Judge Bazelon, reversed the Commission's 1¢ post-Policy Statement escalation for Districts 2 and 3. That opinion—*Public Service Commission of New York* v. *F.P.C.,* D.C. Cir. Nos.

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[7] Commissioner Black, while noting his dissatisfaction with the majority's reasoning, apparently felt himself bound by his prior District 4 concurrence in *Amerada;* see 34 FPC at 1013.

19796 *et al.*—is appended to this petition as Appendix C, *infra*, pp. 7a-39a.

The *Turnbull & Zoch* appeal is awaiting decision in the Fifth Circuit on oral argument held November 15, 1966.

For all areas other than the Texas Gulf Coast, the Commission has applied the same in-line level to post-Policy Statement contracts as to pre-Policy Statement contracts, although it may be noted that the Commission's action in doing so in the southern Louisiana area is presently being challenged by the producers in the Tenth Circuit—*Union Texas Petroleum*, Op. 436, 32 FPC 254 (1964), appeal pending, No. 7912, 10th Cir., Oct. 9, 1964.

REASONS FOR GRANTING THE WRIT

This case presents two important issues as to the scope and proper exercise of the Commission's power to impose price and refund conditions upon the grant of permanent authority to sell gas in interstate commerce. On both issues, the decision of the court below is in square conflict with decisions of the Court of Appeals for the District of Columbia Circuit, creating a wholly untenable regulatory situation for the Federal Power Commission. Further, on both issues the decision of the court below is inconsistent with the decisions of this Court, which both in their specific holdings and their general teachings make clear that the Natural Gas Act is designed to protect the consumer from excessive rates and charges by natural gas companies.

I. DETERMINATION OF THE IN-LINE PRICE

There is no dispute among the parties that the Federal Power Commission may certificate new sales of gas in interstate commerce only where the proposed

price is "in-line". "The question is," as Judge Bazelon noted in the *Hawkins-Sinclair* appeal,[8] "in line with what?" (App. C, *infra,* p. 18a). What the dispute comes down to is this: The producers, the majority of the Commission, and the court below believe that new sales should be certificated at prices that are in line with current, essentially unregulated market levels, as measured by the prices currently being negotiated for proposed sales, the prices contained in *ex parte* temporary certificates, and the guideline prices contained in the Commission's Policy Statement. Petitioners, the Examiner, the Commission Staff, the dissenting Commissioner,[9] and the Court of Appeals for the District of Columbia Circuit in *Hawkins-Sinclair* believe that new sales should be certificated at prices that are in line with existing prices which have been tested by the regulatory process, *i.e.,* prices which have previously received permanent certification following hearing, and which are not suspect because they are under judicial review or otherwise.

The difference between the two approaches is demonstrated in the Commission and court opinions in this case. In dissenting from the original determination of 16¢, Commissioner Ross pointed out (J.A. 392; 31 FPC at 644):

> "The principal error of the majority is found on page 14 [J.A. 373; 31 FPC at 634] where it lists those contracts on which it bases its in-line conclusion. Of the 38 contracts listed having prices

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[8] *Public Service Commission of New York* v. *F.P.C.*, D.C. Cir. Nos. 19796 *et al.* (February 7, 1967).

[9] And also one member of the *Amerada* majority, see note 6, *supra.*

in excess of 15¢, 36, or about 95 percent, *are the very contracts whose price is being investigated in this case.* This type of bootstrap rationalization is legally indefensible." (Emphasis in original.)

The court below, in approving the Commission's standard, held (FPC Pet. 28):

"An in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce. This determination cannot be made if all current sales are within the 'suspect price' doctrine because of objections to them."

Commenting on the Tenth Circuit's standard, Judge Bazelon stated (App. C, *infra,* p. 28a):

"Moreover, we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case. Temporaries and contract prices do reflect current conditions in the industry because they reflect real dealings in the market place. This recognition, far from justifying reliance upon these prices, provides a reason for disregarding them. As we have noted, the need for in-line pricing arises because the unregulated market place cannot protect the consumer adequately. Reliance on prices over which there has been no careful regulatory control contradicts this need."

Indeed, as Judge Bazelon correctly points out (App. C, *infra,* p. 30a), the very purpose of Section 7 negatives the Tenth Circuit's current market price approach:

"The purpose, quite simply, of a § 7 proceeding is to protect the consumer until the FPC can determine the just and reasonable rate. This latter determination depends, in part, on current conditions in the industry. The determination of an in-line price should not depend on current condi-

tions, unless, in a particular case, there is something special about these conditions which requires the FPC to sacrifice some of the consumer's protection. . . . But the FPC has advanced no such reasons in this case. Here the FPC used temporarily certificated and contract prices in an automatic, arithmetical way to raise the in-line price without attempting to justify the decrease in consumer protection."

Judge Bazelon also observed, as Judge J. Skelly Wright had in an earlier in-line appeal,[10] that maintaining an in-line price at the level fixed in earlier cases in no way results in a price freeze,[11] since under Section 4 of the Act a dissatisfied producer can file and, within six months at most, make effective his original contract price; this higher price is, however, subject to refund

> "if the FPC later finds that the price charged was not just and reasonable. In this way, the consumer is afforded at least some protection against excessive prices." (App. C, *infra,* p. 22a, footnote omitted.)

Thus, while it is true that the position urged by petitioners and required by the D.C. Circuit's decision (App. C, *infra,* pp. 30a-31a)

> "may cause the in-line price to be frozen temporarily during the interim period between sales of

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[10] *Atlantic Refining Co.* v. *F.P.C.*, 316 F. 2d 677, at 679 (D.C. Cir. 1963). The Tenth Circuit expressed its disagreement with Judge Wright's formulation (FPC Pet. 28-29).

[11] The difference between freezing the in-line price—*i.e.,* the initial price at which a certificate is issued—and freezing the effective price the producer may collect should be noted. No party in this proceeding has suggested freezing the effective price.

gas and the rate determination under § 4 or § 5 of the Act, [t]his kind of freeze seems to be required by the logic of CATCO and in-line pricing."[12]

We submit that the analysis and reasoning of the D.C. Circuit's decision in *Hawkins-Sinclair* lays bare the error of the Tenth Circuit's decision in *Amerada.* Further, the sharp and irreconcilable conflict between the decisions of the two circuits on this issue requires an early resolution by this Court.

The specific in-line issue here presented has not previously come before this Court because in all prior cases the Commission (a) did not rely on suspect prices in arriving at an in-line price, and (b) after once determining an in-line price for an area, maintained that price in subsequent in-line proceedings. Thus, in the southern Louisiana area, the Commission first found an in-line price for the 1957 contracts involved in the remanded *Catco* case by reference to the level of permanently certificated prices in 1954-56, *Continental Oil Co.*, Op. 351, 27 FPC 96 (1962). Subsequently, it maintained that level for 1958-59 contracts in *Placid Oil Co.,* Op. 398, 30 FPC 283 (1963), *aff'd, United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223 (1965); for contracts dated through 1962 and 1963 (well after issuance of the Policy Statement) in *Union Texas Petroleum,* Op. 436, 32 FPC 254,[13] and *Superior Oil Co.,* Op. 437, 32 FPC 241 (1964); and it regards the same in-line level applicable to contracts entered

[12] See note 11, *supra.*

[13] Producer appeals from Opinion No. 436 are presently pending in the Tenth Circuit, *Pan American Petroleum Corp.* v. *F.P.C.,* 10th Cir. No. 7912, argued Sept. 14, 1966.

into today, FPC 1966 Annual Report, p. 129; Order No. 336, adding 18 CFR § 2.63, 28 Fed. Reg. 2844 (1967).

In sustaining the Commission's refusal to elevate the southern Louisiana in-line level, this Court, in its most recent discussion of initial-price problems, stated, *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 at 227:

> "Consumer protection is afforded by keeping the 'in-line' price at the level where substantial amounts of gas have been certificated to enter the market under other contemporaneous certificates, *no longer subject to judicial review or in any way 'suspect'*." (Emphasis supplied.)[14]

It may be significant that the court below, when quoting from this Court's *Callery* opinion, ended its quote after "certificates", omitting entirely the qualification that suspect prices were not useful in in-line comparisons.

The only producing area for which the Commission, after first finding a given price level to be "in-line", has in a subsequent proceeding elevated that level is the Texas Gulf Coast, where it has followed the add-a-penny procedure on four separate occasions. Of those four determinations, one has been sustained (by the court below in the instant *Amerada* District 4 proceeding), two have been reversed (by the D.C. Circuit in the *Hawkins* District 3 proceeding and the *Sinclair* District 2 proceeding), and one is pending (before the

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[14] See also 382 U.S. at 229:

> "The 'in-line' price of 18.5 cents is supported by the contract prices in the south Louisiana area *that were not 'suspect'* . . . ." (Emphasis supplied.)

Fifth Circuit in the *Turnbull & Zoch* District 4 proceeding).

Though only an interim regulatory device, in-line pricing remains an important issue so long as just and reasonable rates have not been fixed by the Commission. It may be noted that, under its area rate-making approach, the Commission has thus far fixed just and reasonable rates for only one area—the Permian Basin—which covers about 10% of natural gas production. For the remaining 90% of natural gas sold in interstate commerce (and indeed, even for Permian, for the Commission's Permian order has been stayed pending appeal), the only real regulatory control has been in-line pricing. Hence, in-line procedures remain of continuing and vital importance in the administration of the Natural Gas Act.

II. THE REFUND ISSUE

A. Background—The Collection of Out-of-Line Prices Under Temporary Certificates

Section 7(c) of the Natural Gas Act provides that before any person may commence a sale of natural gas in interstate commerce he must obtain a certificate of public convenience and necessity from the Federal Power Commission; the section further provides that a certificate shall issue only after a hearing on the application, and that the Commission shall afford notice of such hearing to the interested public. It has been through the operation of these provisions that the present petitioners have been able, over the years, to challenge proposed initial prices which appeared to be inconsistent with the public interest because they were out of line or were potentially excessive, and it has been through the operation of these provisions that

petitioners have been able to secure judicial relief, in *Catco* and the subsequent cases, when the Commission has certificated out-of-line prices.

At about the time that petitioners were first challenging the FPC's unconditional certification of out-of-line prices, the Commission began the widespread practice of issuing "temporary" certificates as a matter of routine to every producer-applicant who requested one —and in time virtually every producer-applicant included a request for one with his application for permanent certification. Although the statute seems quite clearly to indicate that temporary certificates are to be issued only in cases of emergency to the public,[15] *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201 F. 2d 334 (1st Cir. 1953), the Commission in the late 1950's determined that such certificates should be issued for the benefit of the producers, and it accepted, as falling within the definition of "emergency", a producer claim of economic detriment resulting from inability to commence a sale pending the conclusion of the statutorily required hearing.

While the Commission's power to issue temporary certificates under such circumstances appeared rather dubious, the consumer interests—to the extent they knew of such temporaries (and it should be emphasized that temporary certificates are issued *ex parte* by letter from the Secretary, and do not appear in the FPC's regular list of orders)—were at first not unduly con-

[15] A proviso to Section 7(c) reads:

"*Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate . . . ."

cerned, since it seemed clear that there could be no irrevocable injury to the consumer from temporary certification: Prior to its August 1962 *Skelly* decision, the Commission had uniformly and repeatedly held that any error in granting temporary certification could and would be corrected by a refund order on permanent certification. *El Paso Natural Gas Co.,* Op. 335, 23 FPC 369 at 378 (1960), affirmed, *Texaco Inc.* v. *F.P.C.,* 290 F. 2d 149 (5th Cir. 1961); *Socony Mobil Oil Co.,* 26 FPC 532 at 533 n. 1 (1961), 27 FPC 347 (1962); *Texaco-Seaboard, Inc.,* 27 FPC 15 and 482 (1962); *Continental Oil Co.,* Op. 351, 27 FPC 96 (1962).[16] Moreover, because the prices contained in temporary certificates were by definition subject to further Commission review, they could not be (and prior to this case had not been) used in determining the in-line level for other sales.

In *Skelly,* however, the Commission broke with precedent and held, in effect, that a temporary certificate, even if erroneous, did create permanent rights, for it refused to order refunds of that portion of the moneys collected under temporary certificates which was found, upon permanent certification, to be in excess of the in-line level; it attempted to justify its result on the ground that the temporary certificates contained no express refund condition. The present petitioners, who were interveners in *Skelly,* appealed that ruling to

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[16] In requiring refunds of excess amounts collected under a temporary certificate which contained no express refund requirement, the Commission stated (27 FPC 96 at 110) that the statutory language under which temporaries are issued "appears to contemplate a continuous course of adjustment until the time that a final order determines the conditions under which a permanent certificate shall be issued."

the D.C. Circuit; at the same time, a second appeal, challenging the FPC's power to issue temporary certificates, was filed in the same court, and the two appeals were decided by the same panel in January 1964. In those decisions, the D.C. Circuit, while sustaining the FPC's power to issue temporary certificates, *Public Service Commission of New York* v. *F.P.C.*, 327 F. 2d 893, held that the Commission was legally obligated to protect the consumer against excessive, out-of-line prices collected under temporary certificates, *Public Service Commission of New York* v. *F.P.C.*, 329 F. 2d 242; specifically, the court held that the mere fact that a temporary certificate did not contain an express refund condition did not justify the Commission's refusal to require refunds of excess amounts.

Although the Commission's decision here was issued after the D.C. Circuit's *Skelly* decision, the Commission declined to order refunds of the excess amounts, and instead deferred the issue. On appeal, the present petitioners challenged the Commission's failure to order refunds consonant with the D.C. Circuit's opinion in *Skelly;* the producers, on the other hand, asserted that the D.C. Circuit's opinion was incorrect, that the FPC had no power to require refund of the excess amounts collected under the temporary certificates, and that as a result the Commission had no power to sever the issue out for later determination. The court below decided in favor of the producers.[17]

[17] On July 27, 1966—three months after oral argument in the court below—the Commission decided the refund issue it had severed for later disposition at the time of its original March 1964 *Amerada* opinion. The refund decision—*Amerada Petroleum Corp.*, Op. 501—has been appealed to the Tenth Circuit.

B. The Issue Is a Recurring One in the Administration of the Natural Gas Act.

Although the Commission has recently taken action which will prevent recurrence of this problem as to temporary certificates issued after February 1967,[18] there are hundreds of temporary certificates, under which many millions of dollars in excess rates have been collected, that will be affected by the decision of the court below.[18a]

C. The Decision Below Is in Square Conflict With the Decision of the D.C. Circuit in the Skelly Appeal.

There can be no question that the decision of the court below is in square and irreconcilable conflict with the decision of the D.C. Circuit in the *Skelly* appeal—*Public Service Commission of New York* v. *F.P.C.*, 329 F. 2d 242 at 248-50 (1964), *cert. denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963. Although the Tenth Circuit suggested that "the situation in the case at bar differs from that presented to the District

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[18] By Order No. 336, 28 Fed. Reg. 2844, the Commission added § 2.63 to its Rules and Regulations, 18 CFR § 2.63, which provides as follows:

> "For the purpose of protecting consumers from the exaction of out-of-line rates, temporary certificates authorizing sales of natural gas by independent producers in areas where just and reasonable rates have not been determined will contain an express refund condition fixed at a level two cents below the applicable guideline rate set forth in the statement of General Policy No. 61-1, as amended (§ 2.56 of this part), or the previously determined applicable in-line rate, whichever is lower . . . ."

[18a] The Commission estimates that the instant *Amerada* proceeding involves $1.2 million in refunds, seven similar proceedings involve $10.3 million, and 579 other pending contracts involve an indeterminate, but "undoubtedly large," refund potential, FPC Pet. 8.

two opinions indicates that the difference is insubstantial. Thus, the reservations contained in the *Skelly* temporary certificates, which the D.C. Circuit held of Columbia Circuit [in *Skelly*]", a comparison of the "amply support authority for conditioning the permanent certificates by a refund requirement", 329 F. 2d at 249-50, were found by the Tenth Circuit to be "routine, boilerplate language" not justifying refund (FPC Pet. 38). And the Tenth Circuit's holding:

> "refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition" (FPC Pet. 39)

is irreconcilable with the holding of the D.C. Circuit:

> "The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. *The power does not depend upon an explicit refund provision in a temporary certificate.* Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates." 329 F. 2d at 249. (Emphasis supplied.)

The Commission is thus placed in an intolerable position, for whichever way it decides the refund issue, it

runs a considerable risk that its action will be reversed, either by the D.C. Circuit, as in *Skelly,* or by the Tenth Circuit, as here.[19]

CONCLUSION

Sound administrative procedure requires that the Natural Gas Act be applied uniformly throughout the circuits. Even more important, the Act's basic purpose to protect the consumer against excessive rates and charges requires that the decision below be reviewed and vacated. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 9, 1967

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[19] And it may be noted that when the Commission acted responsively to the D.C. Circuit's *Skelly* remand, its order directing refunds was appealed by the producers to the Tenth Circuit where it now pends, that court having denied a motion to transfer to the D.C. Circuit.

by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f(e)]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,796

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

SKELLY OIL COMPANY,
SUN OIL COMPANY,
CALLERY PROPERTIES, INC.,
SHELL OIL COMPANY,
PAN AMERICAN PETROLEUM CORPORATION,
SUPERIOR OIL COMPANY,
HUMBLE OIL & REFINING COMPANY,
W. S. KILROY, et al., and KILROY PROPERTIES, INC.,
H. L. HAWKINS & H. L. HAWKINS, JR.,
PLACID OIL COMPANY, et al.,
INTERVENORS

No. 19,800

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

MONSANTO COMPANY,
MRS. JAMES R. DOUGHERTY, et al., W. A. STOCKARD, et al.,
EDWIN M. JONES OIL COMPANY,
SHELL OIL COMPANY,
H. D. BRUNS & MPS PRODUCTION COMPANY,
CONTINENTAL OIL COMPANY,
LAMAR HUNT,
INTERVENORS